



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Menasco, Inc.
File: B-223970
Date: December 22, 1986

DIGEST

1. Where, regarding timeliness, the contracting agency and the protester provide conflicting statements about when the basis for protest was known or should have been known, the General Accounting Office will resolve the doubt in favor of the protester.
2. Protest need not be dismissed for the protester's failure to provide the contracting officer a copy of the protest within 1 working day after filing with the General Accounting Office (GAO), as required to under GAO Bid Protest Regulations, where prior agency protest provided the contracting agency with the grounds of protest and the agency was able to submit its protest report on time.
3. Where the contracting officer (CO) permitted one offeror to change its price for evaluation purposes after the receipt of initial proposals, the CO conducted discussions and should have given the other offeror in the competitive range an opportunity to revise its proposal.

DECISION

Menasco, Inc. (Menasco) protests the rejection of its offer and the award of a contract to Allied Corporation, Bendix Aircraft Brake & Steel Division (Bendix), under request for proposals (RFP) No. F42600-85-R-0781 issued by Hill Air Force Base, Utah. The RFP contemplated the award of a fixed-price contract for C5 A/B aircraft main landing gear parts. Menasco contends that it reduced its offer in response to negotiations initiated by the contracting officer (CO), who then rejected the price reduction as a late modification, and that the Air Force improperly awarded the contract on the basis of initial proposals while knowing that Menasco was willing to lower its price. Menasco has requested that the Bendix contract be terminated and that its offer be re-evaluated.

The protest is sustained.

037645/131830

BACKGROUND

The RFP contemplated the rent-free use of government facilities provided to the contractor under other government contracts, and advised offerors that for the purpose of evaluating proposals, a rental factor would be added to the proposed price to equalize any competitive advantage the rent-free use of government facilities would give an offeror over its competitors. Paragraph L-116 of the RFP required offerors to compute the rental factor as a fixed percentage applied to the acquisition costs of the facilities in accordance with Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.245-9 (1985). That section of the FAR provides specific percentage rates based on the age of the facilities or prevailing commercial rates, depending on the type of facilities.

The RFP also incorporated by reference the FAR contract award provision, 48 C.F.R. § 52.215-16, advising offerors that the government may award a contract on the basis of initial offers without discussions, and the FAR provision generally prohibiting the consideration of late modifications, 48 C.F.R. § 52.215-10.

Two offerors, Menasco and Bendix, responded to the RFP. - Bendix proposed a price of \$19,395,668 including a .96 percent rental fee. In the cover letter to its proposal, however, Bendix stated that the prices quoted in the proposal were based upon the government authorizing Bendix the use of existing forging dies and existing tooling under contract No. F42600-83-C-0661, and requested the rent-free use of facilities under contract No. F33657-78-L-0115. Menasco's proposal was priced at \$19,173,200, and stated that the price was based on the continued availability of certain government-owned facilities on a rent-free basis under Lease Agreement No. F33657-78-L-0114; in the event rent-free use was not authorized, Menasco's offer stated that a factor of 1.5 percent must be applied to the quoted price to obtain the rent-paid price.

It was not clear from the cover letter to Bendix's proposal whether the request for award on a rent-free basis applied to the stated price, which included the .96 percent rental fee, or to the price before application of the rental fee. Apparently for this reason, the CO called Bendix on June 2, 1986, 2 days after the closing date for receipt of proposals, to determine whether rental charges were already included in its price; if the charges were included, the CO requested the price before rental, and if not, the CO requested a rental

charge expressed as a percentage of the offered price. The CO apparently proceeded on the basis that the percentage price differential between an offeror's price on a rent-free basis and its price on a rent-paid basis would determine the evaluation factor for the use of government facilities on a rent-free basis, since Menasco's rent-free price was evaluated as including its 1.5 percent rental charge, that is \$19,460,798.^{1/}

Bendix responded that its price was on a rent-paid basis because Bendix intended to purchase the government facilities under contract No. F33657-78-L-0115 and would not need rent-free use of the facilities. Additionally, Bendix sent a telex to the Air Force on June 11, 1986, that formally replaced its request for the rent-free use of government facilities with a request that the prices be on a rent-paid basis, based on the intended purchase of the government facilities. The telex also stated that if Bendix did not purchase the facilities, Bendix would pay a rental charge equivalent to .96 percent of the prices quoted in its proposal, or, in lieu of this rental charge, Bendix proposed a .96 percent lower rent-free price than set forth in its original proposal.

Menasco submitted a telex on June 27, 1986, stating that if the rent-free use of government facilities were not approved, then Menasco reduced its rent-paid price by applying a factor of .25 percent as opposed to the previously offered 1.5 percent. The reduction of the rental charge to .25 percent lowered Menasco's proposed price below Bendix's price (assuming a .25 percent factor would be applied for the rental evaluation factor on a rent-free basis). By letter of July 1, 1986, the CO notified Menasco of the rejection of the revision as a late modification to its price proposal.

PROCEDURAL ISSUES

As a threshold matter, the Air Force contends that the protest is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1986), which require that a protest be filed not later than 10 working days after the basis for protest was known or should have been known, whichever is earlier. The Air Force states that Menasco initially was notified on June 25, 1986, that proposal modifications would not be

^{1/} This treatment is inconsistent with the FAR provisions governing the rental rates. See 48 C.F.R. § 52.245.9.

accepted after the closing date, and was required to file its protest within 10 working days thereafter. Menasco disagrees with the Air Force's account of the June 25 meeting and states that it first learned of the rejection of its revised price as a late modification when it received the CO's July 1, 1986, letter. Even assuming that the Air Force's version of the facts would affect the timeliness of Menasco's protest, we point out that where, as here, there is doubt with regard to the timeliness of a protest, we resolve that doubt in favor of the protester. Pharmaceutical Sys. Inc., B-221847, May 19, 1986, 86-1 CPD ¶ 469. On that basis, we will use the Air Force's July 1, 1986, letter to determine the timeliness of the protest.

The record indicates that Menasco timely protested to the agency on July 11, 1986, and that its protest was denied on August 4, 1986. Under our regulations, after a protester has actual or constructive knowledge of adverse agency action on a timely protest initially filed with the contracting agency, any subsequent protest to our Office is required to be filed within 10 working days of such knowledge. 4 C.F.R. § 21.2(a)(3). Since Menasco filed its protest with our Office on August 13, 1986, within the 10-day period, its protest is timely.

The Air Force also contends that the protest should be dismissed because the protester failed to provide the CO with a copy of the protest within 1 working day after filing the protest with our Office, as required by our Bid Protest Regulations, 4 C.F.R. § 21.1(d). The purpose of this requirement is to prevent any delay that might hamper the ability of the contracting agencies to meet the 25 working-day statutory deadline for filing protest reports with our Office. 4 C.F.R. § 21.3(c). While protests may be dismissed for noncompliance with this requirement, dismissal is not warranted in all circumstances. Rosemount, Inc., B-218121, May 16, 1985, 85-1 CPD ¶ 556. In this case, Menasco initially filed its protest with the agency, so the agency reasonably should have been aware of the protest grounds. Additionally, despite the 4-day delay in receiving a copy of the protest, the agency report was submitted in a timely manner. Under the circumstances, the protester's failure to provide the agency with a copy of the protest within 1 day did not prejudice the agency and a strict application of section 21.1(d) would serve no useful purpose. Hargis Constr., Inc., B-221979, May 6, 1986, 86-1 CPD ¶ 438. Therefore, we will consider the protest on the merits.

PROPRIETY OF AWARD

As previously indicated, Menasco basically alleges that the Air Force initiated discussions with Menasco by requesting a

revised rental factor. The Air Force states that Menasco's personnel visited the CO after the closing date for receipt of proposals and the CO advised Menasco that a 1.5 percent rental factor would be added to Menasco's price for evaluation purposes. After being informed by Menasco that the company was in the process of conducting an internal audit and that the rental factor might change, the CO states he specifically informed Menasco that revisions to its proposal after the closing date for proposals could not be accepted.

It is unnecessary for us to resolve whether discussions were initiated with Menasco since the record indicates that discussions in fact occurred between the agency and Bendix. Discussions occur if an offeror is afforded an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of the firm's proposal. Technical Servs. Corp., 64 Comp. Gen. 245 (1985), 85-1 CPD ¶ 152. Discussions are to be distinguished from a request for clarification that is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal. Id. In this case, the CO clearly needed more information to evaluate Bendix's offered price on its initially requested rent-free basis. In response, Bendix's June 11 telex repudiated the initially proposed price on a rent-free basis and submitted effectively a revised offer of the same price on a rent-paid basis. The award to Bendix based on this information thus was made not on the basis of initial proposals, but after discussions.

When an agency conducts discussions with one offeror, it must conduct discussions with all offerors in the competitive range and afford them an opportunity to revise their proposals. See Greenleaf Distribution Servs., Inc., B-221335, Apr. 30, 1986, 86-1 CPD ¶ 422; Technical Servs. Corp., supra. It therefore follows that Menasco should have been afforded an opportunity to revise its initial proposal.

We further point out that neither offeror's initial proposal or supplemental submission contained a computation of the rental factor in accordance with the FAR, as required by paragraph L-116 of the RFP, and this information should have been requested.

We therefore sustain the protest.

By letter of today to the Secretary of the Air Force, we are recommending that the Air Force reopen discussions to afford both offerors the opportunity for submission of best and final

offers and to obtain the necessary information, consistent with the RFP and FAR, 48 C.F.R. § 52.245-9, for the evaluation of offers on a rent-free basis. If the evaluation warrants award to Menasco, we further recommend that the Air Force terminate the existing contract for the convenience of the government and make award to Menasco.

CONCLUSION

Because the Air Force permitted the eventual awardee to revise its proposal without affording the protester the opportunity to submit a revised proposal, we sustain the protest and recommend that the Air Force reopen discussions.

for Milton L. Auster
Comptroller General
of the United States